No. 21167

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEARLEY M. LEWIS and MILDRED C. LEWIS,

Appellants,

v.

STEWART L. UDALL, as Secretary of the United States Department of the Interior, et al,

Appellees.

On appeal from the United States District Court for the District of Arizona

BRIEF FOR APPELLANTS

JOHN D. LEWIS

Holman, Lewis, MacArthur & Carver
Attorneys for Appellants,
2109 Mill Avenue,
Tempe, Arizona 85281

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

COURT CASES

STATUTES

REGULATIONS

MISCELLANEOUS

No. 21167

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEARLEY M. LEWIS and MILDRED C. LEWIS, Appellants, v. STEWART L. UDALL, as Secretary of the United States Department of the Interior, et al, Appellees.	On appeal from the United States District Court for the District of Arizona

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order entered May 16, 1966, by by the District Federal Court for the District of Arizona, denying Plaintiffs' motion for reconsideration of the opinion and order granting Defendants' summary judgment (R. 221) and the order entered March 22, 1966, denying Plaintiffs' motion for summary judgment and granting Defendants' motion for summary judgment (R. 193). The underlying action was brought by the Appellants Perley M. Lewis and Mildred C. Lewis on March 12, 1965, against Appellees and pursuant to The Administrative Procedure Act (5 U.S.C. 1009) at Chapter 85, 28 U.S.C. 1361, as amended by Public Law 87-748, 76 Statutes 744, approved October 5, 1962, for the purpose of obtaining judicial review of the decisions of the Defendants setting aside,

vacating and cancelling the sale of public lands to Appellants, (which decision reversed previous decisions of the Appellees, at least one of which was final, approving the application of Appellants to purchase public lands and declaring Appellants the purchase thereof), and for a decree cancelling the adverse decision of Appellees and directing the Appellees to issue to Appellants a cash certificate and patent to the public lands involved. The public lands involved are in Maricopa County, State of Arizona (R. 3)[1] In response to the action, Appellees filed a motion for summary judgment (R. 19-35)and Appellants filed an opposition to Appellees' motion for summary judgment and Appellants' own motion for summary judgment (R. 36-190).

The matter was thus submitted after oral argument before the court, the Honorable Walter Craig presiding, and on March 22, 1966, the court entered its order granting Appellees' motion, denying Appellants' motion and directing entry of judgment for Appellants.

Appellants then filed a motion for reconsideration and a memorandum in support thereof (R. 196-216) which, after hearing had without oral argument before the same honorable judge, was denied on May 16, 1966 (R. 221).

Opinion denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment was duly entered (R. 193).

This court has jurisdiction by virture of 28 U.S.C. 1291.[2]

---

[1]"R" references are to record on appeal in the court below and the proceeding in that court which have been filed as the certified record.

[2]Section 10(e) of The Administrative Procedure Act says in part: "Scope of Review—So far as necessary to a decision where presented, the reviewing court shall decide all relevant questions of law, and interpret all constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (b) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; . . .".

It is the position of Appellants that the Appellees performed acts outside of the law and such acts were therefore not committed to agency discretion.

STATEMENT OF THE CASE

(a) INTRODUCTION

The statutes and regulations of the Department of the Interior and the proceedings before the Department, the trial court and on this appeal, which are involved in this appeal, are as follows: The Taylor Grazing Act, specifically Section 7 thereof (43 U.S.C 315 (f) which provides in part as follows:

> ". . . Upon the application of an applicant qualified to make entry, selection or location under the Public Land Laws and filed in the Land Office of the proper district, the Secretary of the Interior *shall* cause any tract to be classified in such application, if allowed by the Secretary of the Interior, *shall* entitle the applicant to a *preference right to enter,* select or locate such land, if open to entry as herein provided." (Emphasis supplied).

Also involved are the statutory provisions of Section 14 of The Taylor Grazing Act (43 U.S.C. 1171, as amended 1947) which provides in part as follows:

> "Section 1171. Notwithstanding the provisions of Sections 678, 212, 321, 662 and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the Land Office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding 1,500 acres, which in his judgment it would be proper to expose for sale after at least 30 days notice by the Land Office of the district in which such land may be situated; provided, that for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right, the Secretary of the Interior is authoriged to make an equitable division of

the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price; . . . ."

Since the classifications for land disposals, under the Public Land Laws (including but not restricted to Section 14 of The Taylor Grazing Act), are made pursuant to Section 7 of The Taylor Grazing Act heretofore quoted, it is pertinent to understand the terms used therein. According to Glossary of Public Land Terms put out by the Department of the Interior, an entry was defined as follows:

"In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by payment of cash or its equivalent and/or by entering upon and improving the land."[3] (Emphasis supplied).

The regulations involved are as follows: 43 C.F.R. 250.5 says:

"Effect of Application. The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the Public Land Laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

43 C.F.R. 250.11 says in part:

"(a) Declaration of high bidder. When all persons present shall have ceased bidding, the manager will, in the usual manner reclare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . , announce the amount of the highest bid and declare the offeror thereof . . . *the highest bidder,* provided that the buyer immediately pays to the manager the amount of the bid if he has not already done so . . . ." (Emphasis supplied).

"(4) If, by the end of the preference right period, no pref-

[3]Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

erence right has been asserted, the sale will be *declared closed* and the manager may declare the highest bidder th *purchaser.*" (Emphasis supplied).

Regulation 43 C.F.R. 250.12 (c) states as follows:

"When there has been full compliance with the regulations on his part, the manager *will* issue a cash certificate to the purchaseer." (Emphasis supplied).

(b) HISTORY OF THE CASE

By reason of Appellee's motion for summary judgment in this matter, the facts as set forth by Plaintiffs are not in dispute. These facts are set forth in Plaintiffs' Complaint in paragraphs IV through VII of said Complaint (R. 6-14). The facts are again summarized in Appellants' response to Appellees' motion for summary judgment and Appellants' own motion for summary judgment. (R. 39-51)

The summary of these facts is as follows:

On April 25, 1956, an application for the sale of 160.62 acres of land, which is the subject matter of this action, was made by one Mary T. Rexroat for sale at public auction. Subsequently, on July 1, 1957, the Lewises filed their application for the sale of the same land.

Thereafter, the Land Office classified the land as suitable for public sale (see Exhibit One attached to Appellants' motion for summary judgment). The classification report made under Section 7 of The Taylor Grazing Act, stated:

"It is recommended that subject lands be classified as proper for sale at public auction at not less than the appraised value as applied for."

The same report found that the lands were appraised at $50.00 per acre, or $8,031.00 for the 160.62 acre tract. The lands were put up for sale under the Rexroat application, the land classification report having been approved by the Department on July 17, 1959. The notice of sale was duly published in accordance with the law and the rules and regulations of the Department of of the Interior.

It is important to note that there were no conditions or reservations, contained in the notice of sale, which were not completely compiled with by Plaintiffs. A copy of the form of notice for publication which was used at the time, is attached to Appellants' motion for summary judgment in the District Court action as Exhibit Four. This is also a part of the record. The form that was used at the time this case arose is not the same form in use at the present time. At the present time, the Department of Interior uses a notice for public sale which specifically contains a right in the authorized officer to reject any bids prior to the time of issuance of cash certificate. (See Exhibit Five attached to Appellants' motion for summary judgment).

The sale was held according to law in the Phoenix Land Office on November 3, 1959, with a number of persons bidding at the sale. The highest bid was some $9,150.00 by Mary Rexroat who was the high bidder and was so declared, subject to the right of adjoining land owners to file preference right claims within thirty days, as allowed by law. Four applications for preference right claimants were filed. The Plaintiffs' application was one of these, and each of the preference right claimants paid the full bid price of $9,150.00 to the Land Office and submitted proper proof of their right to preference.

By its decision dated December 4, 1959, the Land Office Manager declared them to be qualified preference right claimants and pursuant to 43 C.F.R. 250.11 they were given thirty days within which to divide the land. No preference right claim was made by the original applicant, Mary Rexroat, and her case was closed. A copy of the December 4, 1959 decision is attached to Appellants' motion for summary judgment as Exhibit Six (R. 89-90).

Proper procedures were taken under 43 C.F.R. 250.11 and by January 25, 1960 the parties had done everything required of them under the law and regulations to purchase the land. The only thing remaining to be done was the ministerial act of

the Manager in directing the issuance of cash certificate and patent. This the Manager failed to do for over five months.

While awaiting the ministerial acts some unusual circumstances occurred.

On February 23, 1960, after the successful bidders and purchasers had been waiting for almost a month for a cash certificate to issue, the office of the Secretary of the Interior issued a press release entitled "Further Safeguards Against Land Speculation Announced". A copy of this press release is part of the record and is attached to Appellants' motion for summary judgment as Exhibit Nine. (R. 93-98).

This so-called "policy" was not issued in the form of regulations, but instead was issued in the form of a press release dated February 23, 1960, and in short was entitled "A Broad Program of Safeguards Against Speculation in Land Sales Under the Public Sales Act."

As a result of these unpublished-in-the-Federal-Register non-regulation press release policies, the Manager of the Phoenix Land Office entered an order on June 6, 1960, (over five months after the Plaintiffs had done everything necessary to entitle them to the land), without prior notice, vacating the previous decision of the Manager on December 4, 1959, which had ordered disposal and division of the lands and vacated the sale held November 3, 1959 and rejected all applications. This decision said in part:

> "These applications have been reviewed for compliance with the new departmental anti-speculation policy, which is entitled as follows: 'In connection with the functions of the Bureau of Land Management under authority of the Public Sales Act, Section 2455 R.S., no land *will be classified* as suitable for auction thereunder if; . . . (b) the land is within the influence of expanding cities or towns where the land uses are changing to more intensive uses.' " (Emphasis supplied).

It is to be noted here that this policy merely stated that no

land "*will be* classified" as suitable, whereas, in the instant case, the land had already been classified and this order acted as a revocation of the prior classification of suitability for sale. The decision went on to state:

> "It is believed that the subject sale does not meet the criteria set by the new departmental policy, *and since this is a retroactive policy,* and must be applied to pending as well as new applications, Manager's decisions of December 4, 1959, sale of November 3, 1959 are hereby vacated and applications . . . rejected." (Emphasis supplied).

It is to be seen that the June 6, 1960 decision of the Acting Manager was based on a retroactive application of press release policies which were by their own terms, prospective.

The press release policy also condemned as a speculator anyone who purchased adjoining land in order to establisr a preference right to become a purchaser of land to be sold at public auction under Section 14 of The Taylor Grazing Act (which is Section 2455 of the Revised Statutes, as amended therein), even though there was no law against speculating on the purchase of Federal land sold at public auction or attempting to purchase the same on such basis.

Appellants' motion for summary judgment states that the Appellants were considered speculators by the Department, as is shown by Exhibit A, (R. 75-78), attached to Appellants' motion for summary judgment; see specifically (R. 78) which is a letter signed by E. R. Rowland, State Supervisor, describing Appellants as speculators. This fact is admitted by the Government and not controverted by them in their response to Appellants' motion for summary judgment. For the purpose of this Appeal, it is deemed admitted by the Government that Appellants were considered speculators and this is one of the main reasons for the decisions denying their application.

Appeals of this decision followed and although there were originally four preference right claimants, three did not prosecute

their appeals in the various stages and their rights have long since been closed out by the Department, and the Department has stated that the Plaintiffs Lewis are the only ones having claim to the subject 160.62 acres of public land.

In its June 6, 1960 decision, the Acting Manager did not raise any questions as to the validity of th esale. The sole reason for the decision was a retroactive application of unpublished, non-regulation press release policies applied retroactively, and because of a unilateral decision that Mr. Lewis was a speculator, in violation of the press release.

The decision of June 6, 1960 was appealed by Appellants to the Director of the Bureau of Land Management, Washington, D. C. and on October 11, 1960 the Director affirmed the decision of the Acting Manager of the Phoenix Land Office. (Exhibit Eleven attached to Appellants' motion for summary judgment). On November 23, 1960, the Plaintiff's filed a notice of appeal to the Secretary of the Interior in Washington, D. C. from the decision of October 11, 1960 of the Acting Director. No decision was to be forthcoming on this appeal *for over three years,* until December 20, 1963. During this period of time some very interesting things occurred.

On February 14, 1961, Secretary of the Interior Udall announced through another press release a new so-called "Land Conservation Program" which was entitled "Secretary Udall Orders Public Land Moratorium." This policy was again not published in the Federal Register but the public was advised of the same through a press release. (See Exhibit Twelve attached to Appellants' motion for summary judgment (R. 111-119)).

With the Court's indulgence, some provisions of these press release policies are of vital interest to this case. The press release said in part:

> "According to the policy statement, lands which cannot properly be developed under existing public land laws will

be retained in Federal ownership *until the necessary laws can be enacted.* The Department will no longer continue to try to force present-day land needs into the *unworkable straight-jacket of out-dated laws. . . .*"

". . . The policy statement broadens and supercedes a more limited statement of *anti-speculation policies* issued February 5th and 23rd, 1960." (Emphasis supplied).

By this press release the Secretary announced his intention to ignore the regulations and the statutes until "the necessary laws" could be enacted, and until such event occurred the Department announced its intent to "no longer continue to try to force present-day land needs into the unworkable straightjacket of out-dated laws", the mere fact that Congress had passed these laws to the contrary notwithstanding. This policy announcement was *not* carried into effect or supplmented by any rule or regulation.

Next, on January 24, 1963, the Department amended its regulations, specifically 43 C.F.R. 250.5, in an attempt to nullify all other regulations in this section and statutes, giving the Secretary unbridled and unreviewable power to stop any proceedings for the purchase of public lands prior to the issuance of a cash certificate. In furtherance of this end, in the same year, 1963, the Land Office inserted in its notice of public auction sales, the phrase giving them the same power. (See Exhibit Five attached to Appellants' motion for summary judgment).

On April 19, 1963, without prior notice of hearing, and unknown to the Plaintiffs, one Robert M. Mangam, Deputy Assistant Director of the Interior, wrote a memorandum to the Director, Bureau of Land Management, on the subject appeal. (See Exhibit Thirteen attached to Appellants' motion for summary judgment (R. 120)). This memorandum asked that the case record be returned to Phoenix for a determination of whether or not the appraised price in the file reflected the fair market value. Heretofore, the appraised value of the land had never been a point in issue in any of the prior decisions.

Thereafter, the files on the appeal were returned to the Arizona office for this purpose. Appellants were not advised by the Secretary's office that the files had been returned but Appellants became aware thereof by reference to the local Land Office's "Serial Register" and did inspect the file after return, and to their great surprise, the file contained a memorandum dated August 13, 1962, signed by one, Robert K. Coote, stating that from *"the record"* the amount paid was less than the fair market value at the time of the original sale. (See Exhibit Fourteen attached to Appellants' motion for summary judgment (R. 12)).

At this point, the Secretary had not yet issued his decision but this previous correspondence just noted indicated that the Secretary wanted to find that the land was worth much more at the time of the sale than it was originally appraised for. No new appraisal had been made but it could only be quite apparent to the local office what the appraisal must be, especially because in the file, *on the letterhead and paper of the Secretary of the Interior, was an original of an already prepared written decision, unsigned, rejecting the appeal on the grounds that the 1959 appraisal was too low.* And this decision was in the file *even though no subsequent appraisal had been made.* (See Exhibit Fifteen attached to Appellants' motion for summary judgment (R. 122)). One might wonder, logically, whether or not this could have influenced the local Land Office in their new appraisal?

Finally, on December 20, 1963, the Secretary's decision came down. (See Exhibit Twenty-two attached to Appellants' motion for summary judgment (R. 187-189)). The first three paragraphs (almost the entire first page) and the last paragraph of the December 20, 1963 decision *are identical, word for word, with the unsigned prepared written decision which accompanied the file back to Phoenix on April 19, 1963, and which had apparently been prepared in accordance with the Robert A. Coote memorandum of August 13, 1962.* (See Exhibit Fifteen attached to Appellants' motion for summary judgment (R. 122)).

Four months after this decision was rendered, a $9,150.00 check, dated April 6, 1964, was mailed by the Land Office in error to the wrong address of Plaintiffs and was not delivered to Plaintiffs until April 10, 1964, whereupon Plaintiffs did, immediately that same day, hand deliver the Land Office's letter and the check contained therein back to the Land Office informing them that an appeal to the courts would be forthcoming.

It is submitted to the Court that the facts as above recited by Appellants are admitted by Appellees and are the facts of this case.

After the filing of thise case in March, 1965, the Appellees responded with a motion for summary judgment (R. 19) which was, in turn, responded to by Appellants by their own opposition to Appellees' motion for summary judgment and Appellants themselves made a motion for summary judgment (R. 36).

After hearing on said motions by the Honorable Walter Craig, an opinion and order was handed down on March 22, 1966 (R. 193).

Appellants then made a motion for reconsideration and without oral argument an order was entered by the District Court denying this motion for reconsideration on May 16, 1966 (R. 221).

In its opinion and order denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment, the court in part said:

> "It is the opinion of this Court that the Secretary had the discretion to accept or reject the offer of the Plaintiff, Lewis, up to the time a cash certificate was actually issued. 43 U.S.C. 1171, 43 C.F.R. 250.5"

The court went on to say:

> "The sale held in the local Land Office was, in fact, an auction with reserve, and it has been so held. Ferry v. Udall (9 CCA. 1964), 336 F2d. 706, 710, Cert.Den. 85 S.Ct. 1449, following Willcoxson v. United States (CCA. D.. 1936), 313 F2d. 884."

The court went on to state:

"This court does not find it necessary to examine the finding or concur with the court in Ferry, that the Administrative Procedure Act does not require judicial review of the exercise of agency discretion in a case such as this one. Whether there is a binding obligation on the Secretary to sell, is a question of substantive law, and the answer should be the same without regard to whether the relief sought was under the Federal Tort laims Act, 28 U.S.C. 1346 and 2671 et seq, or under the Administrative Procedure Act, 5 U.S.C. 1001, et seq. Ferry v. Udall, supra, at page 711; Willcoxson v. U. S. supra."

Although finding against Appellants, the Court went on to say:

"Notwithstanding the foregoing and the resulting judgment in this matter, it appears to this court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, are not summarily cast aside by a change in policy or a summary decision to withhold the cash certificate. The remedy for this unhappy situation rests, however, with the Congress of the United States, or the Executive Department, and not with the courts."

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying Plaintiffs' motion for summary judgment;

2. The District Court erred in granting the Defendants' motion for summary judgment;

3. The Disrict Court erred in deciding that the Secretary had the discretion to accept or reject the offer of Plaintiffs Lewis up to the time a so-called "cash certificate" was actually issued;

4. The District Court erred in stating the auction was an auction with reserve;

5. The District Court erred in concluding that if it was an auction with reserve, that the reserve had not been met by Plaintiffs.

QUESTIONS PRESENTED

1. Whether an application to purchase land under Section 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c. 865, 48 Stat. 1272, and Act of June 28, 1934, c. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171), has any rights prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 243, which now appeats as 5 U.S.C. 1009).

3. Whether or not the acts of the Secretary in exercising his discretion were based on considerations outside the law and therefore reviewable under Section 10 of The Administrative Procedure Act and whether or not the actions of the Secretary of the Interior and the Department of the Interior were so outside the law as to be reviewable by the courts, regardless of the finality of the Secretary's discretion, and,

4. Whether or not, in a sale of land under Sections 7 and 14 of The Taylor Grazing Act, the reserve specified in the auction is the actual issuance of a paper known as a cash certificate. stating that certain acts have been done, or the actual doing of said acts, regardless of whether or not a paper reciting that they had been done is issued by the Department.

5. Whether or not the constitutional rights of the Appellants Lewis were violated by the Department of the Interior in that the press release admitted by Appellees as being true, amounted

to an imposition of sanctions and pains and penalties and, in essence, an attainder against the Appellants in that such press releases and policies pursuant thereto, by the Department of the Interior, classified Appellants into members of a group deserving of sanction and because of having so classified them then proceeded to inflict punishment upon them without judicial trial.

SUMMARY OF ARGUMENT

1. As to the first question presented, it is the position of Appellants that under the posposal section of The Taylor Grazing Act, a right does exist, to-wit: the right to enter. This is a Constitutional right which cannot be interferred with without due process of law. To allow the Secretary or any administrative agency to do away with the statutory right without some form of review for arbitrariness, or unreasonableness, is a violation of a constitutional right. In this regard, it is to be pointed out that the case of *Ferry v. Udall* (9 C.C.A. 1964), 336 F2d. 706, fails to note or even mention Section 7, the classification section of The Taylor Grazing Act, which specifies procedure for the disposal of all lands under The Taylor Grazing Act, including Section 14 of The Taylor Grazing Act, and that in this regard *Ferry v. Udall,* supta, was in error.

2. As to the question as to whether or not disposal as distinguished from classification of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, is so committed to agency discretion as to not be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, C. 324, 60 Stat. 243, which now appears as 5 U.S.C. 1009), it is Appellants' position that, again, the Court in the case of *Ferry v. Udall,* supra, confused the classification of what land is suitable for disposal with the procedure after a qualified application has been allowed, and the applicant has a preference right to enter, which is the case at hand. In essence, it is the position of the Appellees that under a single regulation, 43 C.F.R. 250.5, which says that any time

prior to the issuance of a cash certificate, the authorized officer may determine that the lands should not be sold, gives him the right to make such a determination, arbitrarily, without good reason or cause, and thus deny the applicants preference right to enter under the statute. That such a position ignores the provisions of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, which imposes upon the Secretary of the Interior and the Depart- certain actions have been taken, and ignores the rights given under Section 7 of The Taylor Grazing Act. In this regard, it should be pointed out that courts are exceedingly slow to rule that a statute precludes all judicial review.[4] The legislative attempt to forbid judicial review, must be clear and convincing and unmistakeable.[5]

3. It also is the position of defendants that the facts at hand differ from other cases presented to this Court at previous times in these matters. That the acts of the Department of the Interior (and the Secretary of the Interior) in exercising its discretion, were based on considerations outside of the law, and therefore reviewable under Section 10 of The Administrative Procedure Act.[6] That from the facts of this case, after casting aside all

---

[4]Guardian Life Insurance Co., v. Bohlinger, 308 NY. 174, 124 NE2d. 110. Rehearing denied, 308 NY.810, 125 NE2d. 876; Airline Dispatchers Association v. National Mediation Board, 89 App. D.C., 24, 189 F2d.685. Certiorari denied, 342 U.S. 849, 96 L. Ed. 641, 72 S. Ct. 77.

[5]Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946) "To preclude judicial review under this Bill, a statute, if not specific in withholding review, must upon its face give clear and convincing evidence of intent to withhold it."

[6]Section 10 of The Administrative Procedure Act, 5 U.S.C. 1009, which says in part: "Scope of Review—So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of an agency action. It shall . . . (b) hold unlawful and set aside agency actions, findings and conclusions found to be (1) *arbitrary, capricious and an abuse of discretion,* or otherwise *not in accordance with law; . . .*" (Emphasis supplied)

webs of legalistic intricacies, it is quite apparent that the actions of the Department of the Interior were not based upon the statutes, or the regulations, but upon pure press release policy and unilateral declarations, and therefore, outside the law. It is also the position of the Appellants that the procedure used by the Secretary, regardless of its being based upon law or retroactive press releases, was completely outside the law and the regulations, was secretive and was based on intricate departmental memorandums not shown to Appellants and therefore contrary to the regulations.[7]

4. As to question number four, it is Appellants' position that if this Court finds that a public sale under Section 14 of The Taylor Grazing Act is an auction, as stated by this Court in the case of *Ferry v. Udall, supra,* that said reserve is not the issuing of a cash certificate reciting that certain acts have been done, which is, in effect, a departmental memorandum, but is the actual doing of said acts, regardless of whether or not such memorandum has been issued, and that once said acts are performed the reserve has been met.

5. In regards to question number five, the facts as admitted by Appellees by reason of their motion for summary judgment and failure to object to the facts as set forth by Plaintiffs in their motion for summary judgment, or to controvert them by affidavit or otherwise, shows quite conclusively that one of the basic reasons for Appellants not being issued a cash certificate and subsequent patent was based upon the classification of Appellants as speculators and therefore was in direct violation of the recent Supreme Court decision of *U.S. v. Archie Brown,* 381 U.S. 437 (1965), in that the Department has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, and therefore inflicts punishment upon them without judicial trial, depriving them of the

---

[7]43 C.F.R. 221.99 (d)-Basis of decisions; Record. See also current 1966 C.F.R. 1850.0-8 (a)(4).

right which every United States citizen has, of attempting to obtain through public sale, exchange, or otherwise, public lands.

ARGUMENT

I. An application to purchase land under Sections 7 and 14 of The Taylor Grazing Act[8] has rights under the statutes and regulations prior to the issuance of a cash certificate. In arguing this point, Appellants must face head-on *Ferry v. Udall, supra,* and *Willcoxon v. United States* (CCA. DC. 1963), 313 F2d. 884. It is Appellants' contention that the lower court was incorrect in citing *Willcoxen v. U.S., supra,* since it is quite apparent from the facts of that case that the Secretary was not exercising any discretion so vested in him at that stage of the proceedings; he had already exercised his discretion. He was exercising his judicial authority under the last sentence of 43 CFR 250.5 to determine the lawfulness of disposition of land which was unlawful at that time, because it was found to be valuable for uranium, a fissionable material, a fact which clearly vitiates the sale under the Land Disposal Laws.[9]

Also, *Ferry v. Udall, supra,* Appellants feel was in error. However, it also differs from the Plaintiffs' case at hand. Among these distinctions are: (1) in the case at hand, the Secretary's decision of December 20, 1963, injected into Appellants' case a matter of price, when that issue had not been the basis for the local Land Office's prior decision, nor the basis of the Director's affirmation thereof. This was not true in *Ferry v. Udall, supra.* (2) The Secretary's finding of December 20, 1963, that the appraisal of June 6, 1959 was a "mistake" on the part of the local Land Office, was not at issue in *Ferry v. Udall, supra.* (3) The Secretary's attempt, by his decision of December 20, 1963, to use his "discretion" some four years and six months after the

[8]Act of June 28, 1934, C. 865, 48 Stat. 1272, and Act of June 28, 1934, C. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171.

[9]43 U.S.C. 1171 and 43 U.S.C. 1341 (e)

alleged "mistake", and at that late date correct this "mistake" of the local Land Office, *at the expense of Plaintiff,* thereby denying them a right conferred on them by law, also was not the case in *Ferry v. Udall, supra.* (4) In the case at hand, the classification of Appellants as speculator, and branding them as such appears to be the main determinative factor for the action of the Department. Such was not so in *Ferry v. Udall, supra.* Also, the circumstances of the pre-written, unsigned decision influencing the subsequent appraisal, was not present in *Ferry v. Udall, supra.*

A careful review of Section 14 of The Taylor Grazing Act, sometimes called the Isolated Tracts Act, shows that it is a part of The Taylor Grazing Act, even though it is found in a different portion of the statute books, having been passed at a later time. Reading of this section will also show that it has no procedure set up for initiating the disposal under that section. The reason for this is that the procedure classifying lands pursuant to application for disposal of the lands by public sale and other public land laws, is already set up in Section 7 of The Taylor Grazing Act (43 U.S.C. 315(f))

Section 7 of The Taylor Grazing Act provides in part as follows:

> ". . . Upon the application of an applicant qualified to make entry, selection or location, under the *Public Land Laws,* and filed in the Land Office of the proper district, the Secretary of the Interior *shall* cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle applicant to a *preference right to enter,* select or locate such land, if open to entry as herein provided." (Emphasis supplied).

NOTE: This Section provides for disposal "under the Public Land Laws", one of which is Section 14 of The Taylor Grazing Act, dealing with sales at public auction. This is a point which was never mentioned by the Court in *Ferry v. Udall, supra,* but all of the applications for disposing of land heretofore by the Department of the Interior, not only for disposals under The Taylor Grazing Act, but also under other land laws, have been

processed under Section 7, including those under Section 14, the public auction sale disposal section of The Taylor Grazing Act.

Under this procedural Section 7 of The Taylor Grazing Act, certain rights are granted to the applicant. Once his application is made, "the Secretary of the Interior *shall* cause" the tract to be classified. Therefore, the first procedure of the Secretary upon application is to classify the land as suitable for sale or not suitable for sale. This is a matter which is left solely to the Secretary's discretion. If he decides not to classify the land for sale, his discretion is not reviewable. However, the statute goes on to point out that once the classification is made, that is, "if allowed by the Secretary of the Interior", such allowed application '*shall* entitle the applicant to a preference right to enter". What is meant by this terminology?

In essence, once the land has been classified as suitable for sale by the Secretary, the applicant has a "preference right to enter". The word "entry", as used in the Public Land Laws, covers all methods by which a *"right to acquire title"* to public lands may be initiated.[10]

According to the Glossary of Public Land Terms, put out by the Department of the Interior, an entry is defined as follows:

> "In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by *payment of cash,* or its equivalent, and/or by entering upon and improving the land."[11]

Therefore, this "preference right to enter"[12] is a preference right to "acquire title to the land by payment of cash or its equivalent".[13]

Since this is a right granted by the statutes and the regulations,

---

[10]Black's Law Dictionary, 4th Edition, Page 627.

[11]Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

[12]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f).

[13]Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

can the pursuit of this right be denied by the Secretary by arbitrary action on his behalf, or without reason?

It was the position of the Secretary, and the court in *Ferry v. Udall, supra,* that this right could be denied. The argument was that the Isolated Tracts Act[14] did not specify the procedure to be followed in selling said tracts. This position was adopted by the court in the *Ferry v. Udall, supra,* and was erroneous.

The adoption of this argument by the court in the *Ferry v. Udall, supra,* completely ignored the fact that the Isolated Tracts Act is an integral part of The Taylor Grazing Act. In fact, the main purpose of Section 14, which was a last minute amendment by the Senate to The Taylor Grazing Act, is to allow the Secretary to sell at public auction certain lands not exceeding 1,520 acres, which, in his judgment, would be proper to expose for sale.[15]

In reaching its conclusion, this honorable court, in the case of *Ferry v. Udall, supra,* relied heavily upon one particular regulation of the Secretary.[16]

---

[14]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171.

---

[15]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171, U.S. Code, Congressional Service, 80th Congress, 1st Session, 1946, page 1510: "There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program."

---

[16]43 C.F.R. 250.5
"Effect of Application. The filing of an application in conformity with the regulations of this part, will not segregate the lands applied for from any other application under the Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other right, as against the United States, and no action taken will create any contractual or other obligation of the United States."

The court, in *Ferry v. Udall, supra,* stated that this regulation allowed the authorized officer, at any time before the cash certificate is issued, to determine *for any reason he sees fit,* that the land should not be sold and that this determination is not subject to review by the courts.

Such an interpretation effectively nullifies the meaning of a "preference right to enter" given by Section 7 of The Taylor Grazing Act[17] Further, it nullifies the meaning of other regulations under this same section.[18]

These regulations are quite specific in stating what rights accrue to a proper applicant and what the Secretary should do as a mechanical procedure of the sale after the land has been classified as suitable for sale by the Department of the Interior. For example, 43 C.F.R. 250.11 says in part:

"(a) Declaration of High Bidder.

"When all persons present shall have ceased bidding, the Manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . announce the amount of the highest bid and declare the offeror thereof . . . *the highest bidder,* provided that the buyer immediately pays to the Manager the amount of the bid, if he has not already done so. . . ."

"(f) If, by the end of the preference right period, no preference right has been asserted, *the sale will be declared closed* and the Manager may declare the highest bidder the *purchaser.*" (Emphasis supplied).

Regulation 43 C.F.R. 250.12 (c) states in part as follows:

"When there has been full compliance with the regulations on his part, the Manager *will* issue a cash certificate to the purchaser." (Emphasis supplied).

---

[17]43 U.S.C. 315 (f); Black's Law Dictionary, 4th Edition, page 627; Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

[18]43 CFR. 250.11; 43 CFR.250.12 (c).

Keeping in mind the "preference right to enter",[19] granted by statute, together with the Secretary's own regulations,[20] as quoted above, there would appear to be only one logical interpretation of 43 C.F.R. 250.5, and that interpretation is contrary to that of this court in *Ferry v. Udall, supra.*

This regulation, 43 C.F.R. 250.5, allows the authorized officer, at any time prior to the issuance of a cash certificate, to "determine that the land should not be sold".

The question is, in the light of the statutes and regulations, *on what basis may this determination be made?*

By making such determination, the authorized officer is acting in a judicial capacity. Courts may make determinations in determining matters, but not for any reason they deem fit. Their determination must be based on some sound reasoning and must be based upon proper procedure. What the Government is saying is that the authorized officer, under this regulation, can ignore the fact that he *will* issue a cash certificate if certain things are done, and that the sale *will* be closed, and that the highest bidder *will* be declared the purchaser after certain acts have been performed, merely because, quite literally, the officer involved does not like the color of the applicant's hair or some other reason just as ludicrous.[21]

he only logical construction of 43 C.F.R. 250.5 is that the authorized officer may "determine" that the land will not be sold for failure of proper performance of conditions subsequent under the regulations, such as is contained in 43 C.F.R. 250.12, or because of fraud or mutual mistake, or because the land is found to be mineral in character, such as the fissionable uranium discovered in *Willcoxon v. U.S., supra,* or for some other lawful

[19]Section 7, The Taylor Grazing Act; 43 U.S.C. 315 (f).

[20]43 CFR. 250.11; 43 CFR. 250.12(c).

[21]43 CFR.250.11; 43 CFR. 250.12.

reason; *not merely for any reason whatsoever.* To hold otherwise would be to say that the authorized officer may determine that the land should not be sold for any reason he sees fit, something which is not indicated by the regulations, and such a construction completely nullifies the purpose and intent of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, and makes the mandatory language contained in these regulations completely ludicrous.

In essence, in *Ferry v. Udall, supra,* the Court is saying that the mandatory language contained in the above cited regulations and in Sections 7 and 14 of The Taylor Grazing Act, are as dead and unnecessary as the words contained in a Constitution of a government ruled by a dictatorship, and that the words stating that certain things shall follow certain events may be disregarded at any time because of the wording of one regulation giving absolute unbridled and unreviewable power to the appointive head of a department under the Executive Branch of the Government.

II. The determinations of the Secretary and his authorized officers are reviewable under The Administrative Procedure Act.

This question was touched upon by Appellants in the atguments of the last point, however, it requires special consideration because it is quite apparent that in *Ferry v. Udall, supra,* there was a confusion by the court as to what acts of the Secretary were reviewable.

Section 10 of The Administrative Procedure Act prohibits judicial review of agency action by law committed to agency discretion,[22] but goes on to say in the same section as follows:

> "Scope of Review—So far as necessary to a decision where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1)

[22]5 U.S.C. 1009.

arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law; . . ."

It was the erroneous position of this court in *Ferry v. Udall, supra,* that the acts of the Secretary and his authorized officers were not subject to judicial review where a sale of public land was concerned, under Section 14 of The Taylor Grazing Act, dealing with the sale of isolated tracts at public sale.

In reaching this result, the lower court decided that the Secretary's decision was so committed to his discretion that it was not reviewable.[23]

In *Ferry v. Udall, supra,* the court relied heavily upon, and quoted from: *Panama Canal Company v. Grace Lines Inc.* 356 U.S. 309, which was a case where the court decided it would not review toll rates set by the Panama Canal Company because toll rate adjustments were a matter left to the discretion of the company. It was determined by the court in that case that the decisional process was committed to the company's discretion because it involved ". . . matter upon which experts may disagree; they involve *nice issues* of judgment or choice, which require the exercise of informed discretion."[24] (Emphasis added).

In *Ferry v. Udall, supra,* after citing from *Panama Canal Company v. Grace Lines Inc., supra,* the court went on to say that this rule applied to *Ferry v. Udall, supra,* and said:

"Similarly, a decision of whether or not it would be in keeping with sound policy *to sell* a particular parcel of land at a certain offered price involves the exercise of informed discretion."[25] (Emphasis supplied).

It is quite apparent that from this language the court in *Ferry v. Udall, supra,* is confusing *the classification of what land is suitable for disposal with the procedure after a qualified applica-*

---

[23]Ferry v. Udall, *(9 CCA. 1964), 336 F2d. 706, 710. Certiorari* denied, 85 S.Ct. 1449.

[24]Panama Canal Company v. Grace Lines Inc., 356 U.S. 309.

[25]Ferry v. Udall, supra.

tion has been allowed, and the applicant has a preference right to enter, which is the case at hand.

There is no doubt that whether or not land is suitable for sale, involves *nice issues* of judgment and choices which require the exercise of informed discretion. But it is extremely doubtful and even dangerous to say that procedure to be carried on *after this determination has been made,* involves *nice issues.* Is the Secretary or his authorized officer determining "nice issues" when he refuses to give a notice or hearing as to reappraisals made years after initial appraisal for sale of the land? Is he determining "nice issues" when he unilaterally determines that he made a bad bargain by the initial sale? Is he determining "nice issues" when he arbitrarily refuses to recognize a previous order of his authorized officer, approving the land for sale, merely because of press release policies which were released subsequent to that order? Is he determining "nice issues" when he detrmines whether or not conditions subsequent to the sale, as provided in the regulations, have been performed?[26]

The courts are exceedingly slow to rule that a statute precludes all judicial review.[27] The legislative intent to forbid judicial review must be clear, convincing and unmistakeable.[28]

Are we to say that under a single regulation which says that at any time prior to the issuance of a cash certificate, the author-

---

[26]43 C.F.R. 250.11; 43 C.F.R. 250.12.

---

[27]Guardian Life Insurance Co. v. Bohlinger, 308 N.Y.174, 124 NE2d.110. Rehearing denied, 308 NY. 810, 125 NE2d.876; Airline Dispatchers Association v. National Mediation Board, 89 App.D.C.24, 189 F2d.685 Certiorari denied, 342 U.S. 849, 96 L.Ed.641, 72 S. Ct.77.

---

[28]Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946) "To preclude judicial review under this Bill, a statute, if not specific in withholding review, must, upon its face, give clear and convincing evidence of intent to withhold it."

ized officer may "determine" that the land should not be sold,[29] gives him the right to make such a determination, arbitrarily, without good reason or cause, and thus to deny the applicants preference right to enter under the statute?[30]

Where rights are involved, there should be no arbitrary denial of such rights. The term "entry" in the technical sense, means that act by which an individual acquires an *inceptive right* to a portion of the unappropriated soil of the country by filing his claim.[31]

An "inceptive right" is an inchoative right.[32] This is to say that the applicant has a legal right not yet perfected but a right nevertheless.

The right to enter public lands, when granted by statute, is one of the constitutional privileges of citizenship.[33]

Section 7 of The Taylor Grazing Act[34] gives the statutory right to an applicant whose application has been approved by the Land Office. This inchoate right, which is a constitutional right, should not be denied by arbitrary action of the Secretary, and such action should be reviewable.

---

[29]43 C.F.R. 250.5

---

[30]Section 7, The Taylor Grazing Act; 43 U.S.C. 315 (f).

---

[31]73 C.J.S. Public Lands, Section 36, page 685.

---

[32]Webster's Third New International Dictionary, Unabridged Edition, page 1141.

---

[33]43 Am.Jur., Public Lands, Section 20, page 799; 16 Am.Jur.2d, Section 483, page 842; Twining v. N.J., 211 U.S. 78, 53 L.Ed97, 29 S.Ct.14; U.S. v. Waddell, 112 U.S. 76, 28 L.Ed. 673, 5S.Ct. 35.

---

[34]43 U.S.C. 315 (f).

But, again, it is said by the court in *Ferry v. Udall, supra,* that the wording of 43 C.F.R. 250.5 puts all procedures for sale of land under Section 14 of The Taylor Grazing Act, entirely in the Secretary's unreviewable discretion.[35]

However, this is just not so. The Supreme Court of the United States said, in an exchange lieu selection case, *Payne v. New Mexico* (1921) 255 U.S. 367, set forth what the import of language similar to that contained in 43 C.F.R. 250.5 was, in so fas as its application was concerned to Public Land Laws. The court said as follows:

> "But it is said that as the selection is 'subject to the approval of the Secretary of the Interior' no right can become vested, nor equitable title be acquired, unless and until his approval is had and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is 'judicial in nature' and not only involves the authority, but implies the duties 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' (omitting citations). This view of it has been enforced where the Secretary misconceiving his authority and the right of the selector, erroneously declines to approve and cancel selections lawfully made. (omitting citations). And it should be observed that this view has been recognized and applied by the Land Department, although not with uniformity."

This case, which is generally discussing all land laws, makes the point that even though there are provisions under land laws which say that the Secretary's discretion is unbridled as to vest or not to vest title, subject to his approval, this is not an uncommon

---

[35]Ferry v. Udall, supra.

provision under our land laws. Again, for emphasis, as the court said, "The words relied upon are not peculiar to this land grant but are found in many others," and goes on to say that the power is "judicial in its nature" and implies the "duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the selections."[36]

In the case at hand, the District Court cited the *Yosemite Valley case,* 82 U.S. 77, as it was cited in the case of *Willcoxon vs. U.S. (CCA.DC. 1963),* 313 F.2d. 884. Appellants find this to be a case furthering their position, rather than against them. Bear in mind that the facts are admitted, that Appellants had fully complied, by January 25, 1960, with all the requirements of the law and the regulations of 43 C.F.R., particularly sections 250.11 and 250.12; they had paid the price, received a cash receipt, and were fully entitled to a so-called "certificate" under 43 C.F.R. 250.12 (c) as those regulations direct. Why is this? The *Yosemite Valley case, supra,* is one where the entryman had merely filed. His entry had not been approved, nor had he complied fully with the requirements of the regulations. Upon this basis his claim was rejected, yet, in this case we find Mr. Justice Fields, in delivering the opinion of the Supreme Court of the United States, using the following language in part on page 87 of this decision:

> ". . . The power of regulation and disposition (over the public lands of the United States) conferred upon Congress by the Constitution, *only ceases* when all the preliminary acts prescribed by those laws for the acquisition of title, including the payment of price of the land, have been performed by the settlor. *When these prerequisites have been complied with, the settlor, for the first time, acquires a vested interest in the premises . . . of which he cannot be subsequently deprived.* He is *then entitled* to a certificate of entry from the local Land Office and ultimately to a patent to the land from the United States." (Emphases supplied)

It can be seen clearly from this case that under our circum-

[36]Payne v. New Mexico, supra.

stances, Plaintiffs (1) had an "interest in the premises" and (2) were "then entitled to a certificate of entry from the local Land Office" and, finally, (3) entitled "ultimately to a patent to the land from the United States."

In support of the same proposition, see also *Frisbie v. Whitney,* 9 Wall. 187, 19 L.Ed. 668; and *Little v. Arkansas,* 9 Howe 333; and *Bernard v. Ashley,* 18 Howe 43, 15 L.Ed. 285; and *U.S. v. Fitzgerald,* 15 Pet. 407, 18 Howe 483, 15 L.Ed. 285; 9 Pet. 133; 10 Pet. 330; 2 Pet. 659.

Further, in *Wyoming v. United States,* 255 U.S. 489 (1921), we find the Supreme Court of the United States saying:

> ". . . That whenever in cash sales the price has been paid, or, in other cases, all the conditions of the purchase have been performed, the full equitable title has passed, and only the naked legal title remains in the Government in trust for the other party, in whom are vested all the rights and obligations of ownership."

In support of this position, see also *Colorado Coal and Iron Company v. United States,* 123 U.S. 307; and *United States v. Iron Silver Mining Company,* 128 U.S. 673; and *Shaw v. Kellogg,* 170 U.S. 312.

Therefore, it is the position of the Appellants that once they have performed all of the acts necessary to be entitled to a patent, which is admitted, they were entitled to a patent. However, it is the Government's position that merely because an instrument called by them a "cash certificate" was not issued, reciting that the acts had been done, that they had the right, in their unbridled discretion to change the results. As pointed out before, the cash certificate is nothing but an inter-office memorandum reciting that certain acts have been done. The question might reasonably be asked: What is the substance of this situation? Is it the issuing of a document which recites that acts have been done? Or the actual doing of the acts themselves?

It can be seen by the above that once the classification procedure of the Secretary, which is within his absolute discretion,

has been passed, this absolute and unreviewable discretion ceases, rights accrue to the applicant whose application has been approved, and, therefore, the ultimate disposal after the initial proceedings are reviewable under Section 10 of The Administrative Procedure Act in the event that the Department of the Intrior's actions are found to be ". . . arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law. . . ."[37]

III. The acts of the Secretary in exercising his discretion were based on considerations outside the law, were arbitrary, capricious and an abuse of discretion, and therefore reviewable under Section 10 of The Administrative Procedure Act. Keeping in mind that the facts as set forth in Appellants' motion for summary judgment, which are substantially the same as those set forth in this brief, were deemed admitted by the Government by reason of its failure to controvert any of said facts, it is quite apparent that the ultimate decision of the Secretary were based on the following considerations:

(1) Press release policies which were not even in the form of regulations;

(2) Classifying the Appellants as speculators and therefore as citizens persona non grata under the press release policies, and therefore not entitled to acquire public land as long as they remained in said category as unilaterally determined by the Secretary pursuant to his press release policies;

(3) A subsequent reappraisal of the value of the land at the time of bidding, over four years after the bidding had taken place, after the file had been returned to the Phoenix Land Office with, in essence, directions by letter and by an unsigned decision as to what the appraisal should be.

In this regard it is interesting to note the language of the lower court in its decision on the last page thereof (R. 195), which reads as follows:

"Notwithstanding the foregoing, and the resulting judg-

[37] 5 U.S.C. 1009.

> ment in this matter, it appears to this court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale are not summarily cast aside *by a change in policy* or a summary decision to withhold the cash certificate." (Emphasis supplied).

We disagree with the lower court, that this is a matter which necessarily requires a change in the statutes and regulations, but say that it is a matter which can be reviewed by this court. We wholeheartedly agree with the court where it, in essence, finds that the Appellants were "summarily cast aside by a change in policy" and for that matter, a policy set by press releases.

Since it is quite apparent that the Appellees made their decision in this matter based upon the above considerations, said considerations were certainly outside of the law.

Certainly, the power and authority vested in the Appellees in land disposal cases by words such as the last sentence of 43 C.F.R. 250.5, has been held by the Supreme Court of the United States to be "judicial in nature" and "involves the duty to determine the lawfulness of the disposal."[38]

As was said in *Weyerhouser v. Hoyt,* 219 *U.S.* 380, 388, 31 S. *Ct.* 300, 55 *L. Ed.* 258:

> "The jurisdiction and power of *disposition* (as distinguished from classification) of public lands by the Land Department is not arbitrary or discretionary, but subject and must be exercised in accordance with the law, and any disregard of the law by the Land Department is remedial in the courts."

The question may be asked: May the Appellees, or the courts, in interpreting Plaintiffs' rights under the law in this subject case,

---

[38]Payne v. New Mexico, (1921) 255 U.S. 367; Weyerhouser v. Hoyt, 219 U.S. 380, 31 S.Ct. 300, 55 L.Ed. 258; Daniels v. Wagner, 237 U.S. 547, 35 S.Ct. 740, 59 L.Ed. 1102, L.R.A. 1916A, 1116, and cases 1917A, 40; Payne v. Central Pacific Railroad Co. 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 683.

"disregard" all of the other regulations, including 43 C.F.R. 250.11 and 150.12, and interpret Plaintiffs' rights, as this court has done, by its opinion? Did Congress, in passing The Taylor Grazing Act, and the Appellees and their predecessors in passing the numerous regulations pursuant thereto, intend as follows: "Citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, (may) be summarily cost aside by a change in policy or a decision to withhold the cash certificate . . ."?[39]

At least in the *Willcoxon case, supra,* the decision not to sell was based upon lawful procedure, to-wit: discovering that the lands were substantially valuable for mineral and the land could not be sold by reason of The Fissionable Materials Act.[40] The facts as admitted by Appellees in the case at hand show that the same is not true in this case. In this case everything necessary under the law and regulations was done except for the issuance of an inter-office memorandum saying they had been done. The admitted facts show that the actual rejection was based upon considerations completely outside any law or statute, as much so as if the Secretary decided he did not like the color of the applicant's hair. Is such justified merely because a memorandum entitled a "cash certificate" was not issued?

When such a decision is based upon press release "anti- speculation" policies and not even regulations, is such a determination lawful? Was the application of these anti-speculation policies in a retroactive way lawful? Is there anything in The Taylor Grazing Act, as amended June 28, 1934, which limits the number of purchases by citizens at a public auction sale? Is there anything in The Taylor Grazing Act which prohibits what the Government considers to be "speculation" in the purchase of

---

[39]Opinion Order, Number CIV-5451, PHX., page 3 (R. 195).

---

[40]43 USC 1391 (e)

public lands at public auction sales held under the authority of the statutes which are under scrutiny here?

The answer to all these questions is "No."

In the case of *Mason,* A-26176, 61 ID. 25, it was held by the Secretary of the Interior himself, that under these statutes the person is perfectly entitled to purchase adjoining lands for the sole purpose of becoming a preference right purchaser. See also *Mason v. Mason,* 3 *Utah.* 2*d.*222, 282 *Pac.* 2*d.*317

IV. The reserve specified in the auction or public sale under Sections 7 and 14 of The Taylor Grazing Act is not the actual issuance of a paper known as a cash certificate, stating that certain act have been done, but the actual doing of said acts, regardless of whether or not a paper reciting that they have been done is issued by the Department.

In *Ferry v. Udall, supra,* this court held that the reserve in the auction was set out in the regulations, 43 C.F.R. 250.5 and that therefore the Secretary could revoke the sale at any time until the cash certificate was issued. This, the court held, regardless of the provisions as heretofore cited of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, stating that upon the completion of certain acts, the Secretary will issue a cash certificate.

A copy of this so-called "certificate" is attached to Appellants' motion for summary judgment as Exhibit "B". It might be pointed out that this is nothing more than an inter-office memorandum in the Land Department which states that certain acts have been done. The question should be asked of this court: What is the substance of the matter? What is important? Is it the doing of the acts or merely a memorandum which signifies that they have been done, which is a condition of the auction?

See also a copy of the notice of sale as it existed at the time of the auction sale of Plaintiffs' land, Exhibit "D" attached to Appellants' motion for summary judgment. Compare it also with the notices now put out by the Land Department and you will see that they specifically, on their notice, make reservation at

the present time, which they did not at the time of this subject sale (See Exhibit "E" attached to Appellants' motion for summary judgment).

In Appellants' case, everything necessary under the law and regulations was done and is so admitted by Appellees except for the issuance of this inter-office memorandum saying they had been done. Is the sale to be thwarted by the failure of this memorandum? Is the physical act of setting down on paper that certain acts have been done the "reserve" in this auction? Or are the acts themselves the "reserve"? It is shown that the acts were done and this is admitted by the Government.

Such an absurdity has been rejected by the United States Supreme Court. In the case of *Daniels v. Wagner,*[41] it was pointed out that the substance of the law is what should be followed and this law was as follows:

> "This brings us to determine whether the Land Department had the right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, . . . an authority the possession of which was sustained by both courts below."
>
> "In primarily testing the proposition from the point of view of principle, it is well at once to exactly fix its true importance. In doing so, it is to be conceded (a) that the Act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation, to apply to the Land Office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation, and upon the doing and offering to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; (b) that in the particular case the application to enter the lieu land came within the grant of the statute, and all that was required by

[41]Daniels v. Wagner, 237 U.S. 547,557, et seq., 35 S.Ct. 740, 59 L.Ed. 1102, LRA. 1916A, 1116, and case 1917A, 40.

law or lawful regulation was done by the applicant in order to obtain entry; and (c) that it was the plain duty of the proper authorities of the Department on the filing of the entry indue course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its *want of foundation.*" (Emphasis supplied).

V. The constitutional right of the Appellants were violated by the Department of the Interior in that press release (admitted by Appellees as being true) amounted to an imposition of sanctions and pains and penalties and, in essence, an attainder against Appellants in that such press release and policies pursuant thereto, by the Department of the Interior, classified Appellants into members of a group against whom sanctions were taken and because of having been so classified, the Department then proceeded to inflict punishment upon Appellants without judicial trial.

The press release and classification of speculators as a class of people to whom which land would not be sold, amounted to an imposition of sanctions and pains and penalties against Appellants since they were so classified as is illustrated by the affidavits and exhibits attached to Appellants' memorandum for

summary judgment which is part of the record herein. By classifying Appellants as speculators and because this was apparently one of the prime reasons why the sale was turned down, such amounted to the invoking and use by the Department of the Interior in a like manner of a bill of attainder which interfers with a constitutional right, which was the right heretofore referred to as the right to enter public land under the laws and regulations.[42]

In *U.S. v. Archie Brown,*[43] *supra,* the Supreme Court of the United States said:

> "The rights of attainder is that legislature (in our case it would be the administrative department as set up by the Legislature) has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction. . . ."

The court in that case went on to say:

> "Legislative Acts (in our subject case, administrative acts), no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial, are bills of attainder and are prohibited by the Constitution."

It is well to remember the words of the Supreme Court in *Little et al v. State of Arkansas et al,* 9 *Howe* 314, 333; 13 *L.Ed.* 153, which are:

> "It is a well-established principle that where an individual in the prosecution of a right, does everything which the law requires him to do, and he fails to obtain this right by the misconduct and neglect of the proper office, the law will protect him."

In this case it is quite apparent that the Lewises had a right to enter and obtain the land under the law previously cited. This right was denied to them by being classifield as "speculators" by a qualifield legislative act of the Department in issuing new press release policies.

---

[42]Section 7, The Taylor Grazing Act; 43 C.F.R. 250. 11 and 43 C.F.R. 250.12; 43 U.S.C. 315 (f).

[43]U.S. v. Archie Brown, 399—October term, 1964 (June 7, 1965); U.S. Reports, Vol. 381, pages 437-478.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment be reversed, and the cause be remanded with instructions to enter an order granting Appellants' motion for summary judgment and denying Appellees' motion for summary judgment.

HOLMAN, LEWIS, MacARTHUR & CARVER
Attorneys for Perley M. Lewis and Mildred C. Lewis

By: John D. Lewis
John D. Lewis